FILED
JAN 3
CHARLES ELMORE

FILE COPY

No. 555

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE UNITED STATES OF AMERICA, PETITIONER

v.

ALFRED E. NORRIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF

INDEX

	Page
Petition:	
Statement	1
Specification of errors to be urged	10
Reasons for granting the writ	10
Brief in support of petition:	
Opinions below	11
Jurisdiction	12
Question presented	12
Statutes involved	12
Statement	13
Argument	13
Conclusion	18

CITATIONS

Cases:	
Chadwick v. *United States*, 141 Fed. 225	16
Corneli v. *Moore*, 257 U. S. 491	15
Cunard Steamship Co. v. *Mellon*, 262 U. S. 100	14
Davis v. *Alpha Portland Cement Co.*, 134 Fed. 274	17
Glasgow v. *Nicholson*, 25 Mo. 29	17
Grogan v. *Walker & Sons*, 259 U. S. 80	15
Patrick v. *Meserve*, 18 N. H. 300	17
United States v. *Katz*, 271 U. S. 354	6, 15
Statutes, etc.:	
National prohibition act, c. 85, sec. 3, Title II, 41 Stat. 305, 308 (U. S. C., title 27, sec. 12)	12
Criminal Code, sec. 37 (U. S. C., title 18, sec. 88)	13

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. —

THE UNITED STATES OF AMERICA, PETITIONER

v.

ALFRED E. NORRIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered in the above entitled cause on October 3, 1929, reversing the judgment of the District Court of the United States for the Eastern District of Pennsylvania.

STATEMENT

The respondent and one Joel D. Kerper were jointly indicted in the District Court of the United

States for the Eastern District of Pennsylvania upon two counts, the first charging that the de-defendants (R. 3)—

> did * * * conspire * * *, together and with each other to commit a certain offense against the United States of America, to wit: to * * * transport * * * on various dates and from time to time, from Philadelphia, State of Pennsylvania, to New York, State of New York certain shipments of intoxicating liquor * * * containing more than one-half of one per cent. of alcohol by volume, and fit for beverage purposes, in violation of Title II of the National Prohibition Act * * *.

As an overt act in furtherance of the conspiracy charged, the indictment alleged that on or about February 1, 1928, the defendant Kerper shipped from Philadelphia, Pennsylvania, to the defendant Norris in New York, New York, a package containing six unlabeled bottles of intoxicating liquor containing more than one-half of one per cent of alcohol by volume and fit for beverage purposes. (R. 4.)

In the second count the defendants were charged with having conspired to ship on various dates and from time to time from Philadelphia, Pennsylvania, to New York, New York, packages containing spirituous and other intoxicating liquor, without labeling such packages on the outside thereof so as plainly to show the nature and quantity of the contents, in violation of Section 240 of the

Criminal Code. An overt act in support of this count was also alleged. (R. 4, 5.)

The defendant Kerper pleaded guilty to the indictment and was sentenced to imprisonment for one year and three months in the Federal penitentiary at Atlanta, Georgia, the sentence to run concurrently with that imposed upon him in another case. (R. 2.) The defendant Norris pleaded *nolo contendere* (R. 6), and upon the entry of that plea the following stipulation was filed (R. 7–8):

STIPULATION OF FACTS RELATIVE TO DEFENDANT ALFRED E. NORRIS

It is agreed by and between E. G. Davis, Special Assistant to the Attorney General, and Charles Denby, Jr., Assistant United States Attorney, on behalf of the United States and Charles I. Thompson, Esq., and Frederic L. Ballard, Esq., representing defendant, Alfred E. Norris, that for all purposes in connection with the above proceedings, the following facts shall be taken to be true and of record herein with like effect as if set forth in the indictment, to wit:

Defendant, Alfred E. Norris, resides at 55 East Seventy-second Street, New York City. His business is that of investment banker.

Joel D. Kerper, the other defendant, for some years prior to the date of the indictment in the above case, conducted at premises known as 341 Walnut Street, Philadelphia, Pa., a business consisting in major part of the sale and transportation incidental to sale, of intoxicating liquors, in

violation of the National Prohibition Act. Pursuant to said business, the said Joel D. Kerper supplied a large number of customers in Philadelphia, New York and other places. In the course of his business conducted as aforesaid, the said Joel D. Kerper on the dates indicated, made the following shipments by prepaid express from Philadelphia to the said Alfred E. Norris, addressed to him at 55 East Seventy-second Street, New York City. These shipments were labeled as containing the merchandise indicated in each case, and purported to be sent by the shippers named:

Date of shipment	Shipping document number	Alleged consignor	Alleged contents
10/28/26	800-901	J. Bowen & Co.	Syrup.
11/5/26	800-949	National Supply Co.	Olive oil.
2/17/27	800-942	C. Miller & Co.	Grenadine.
6/14/27	800-938	M. L. Brown & Co.	Olive oil.
6/20/27	800-936	M. L. Brown & Co.	Olive oil.
7/11/27	800-933	Gill & Co.	Grenadine.
8/5/27	800-931	D. P. Brown & Co.	Olive oil.
9/2/27	800-917	Penn Paint Co.	Paint.
10/17/27	800-921	Penn Paint Co.	Paint.
11/17/27	800-923	J. P. Simpson	Ink.
12/9/27	800-925	Paul J. Brown	Olive oil.
2/1/28	67-901	Penn Supply Co.	Grenadine.

In all of the above cases defendant, Joel D. Kerper, was the true shipper, instead of the fictitious shipper named; and in every instance the package contained an unlawful shipment of intoxicating liquor for beverage purposes; to wit: rye whiskey. Said shipments were made by defendant, Joel D. Kerper to defendant, Alfred E. Norris, to fill orders for rye whiskey given by said

> Alfred E. Norris to said Joel D. Kerper over the telephone. Payment for said rye whiskey was made from time to time by Norris to Kerper, either in cash or by check. The said rye whiskey was purchased by defendant, Alfred E. Norris, for his own consumption or that of his guests; and he was in no sense a dealer of liquor.

Norris thereupon moved in arrest of judgment, assigning the following reasons (R. 8):

> 1. Upon the face of the record the defendant is not guilty of the crimes charged.
>
> 2. The record shows that defendant merely purchased liquor and the purchase of liquor is not a crime.
>
> 3. The record fails to show in this defendant the degree of affirmative cooperation necessary to render him liable as a conspirator to the substantive offences involved—to wit: the unlawful transportation or false labelling of interstate shipments of liquor.

The motion was denied and Norris was sentenced to pay a fine of $200. (R. 9.) In an opinion contemporaneously handed down (R. 10–13) the District Court "agreed" that the mere purchase of liquor is not an offense under the National Prohibition Act and that the purchaser can not be convicted of aiding and abetting the sale. It furthermore assumed, but without deciding, that where there is nothing in the case but a simple sale the purchaser can not be convicted of conspiring with the seller to make the sale, referring in this con-

nection to the statement of this Court in *United States* v. *Katz*, 271 U. S. 354, that an indictment for conspiracy in such a case would be of doubtful validity. Distinguishing the instant case from one of a simple sale, however, the District Court said (R. 11):

> It does not follow, however, that, where transportation is required by the agreement, there may not be an indictment of the buyer and seller for conspiracy to transport, even though what is contemplated is simply the delivery of the thing sold. Transportation of intoxicating liquor is made a distinct substantive offense by the Act. It is not necessarily involved in every sale. Even if it be conceded that in order to constitute a sale of an illegal commodity, as to which the law recognizes no such thing as title, there must be more than a bare contract to transfer ownership, and that no sale, as that term is used in the act, can be effected without a change of possession (*i. e.*, actual rather than constructive delivery), still, there are many ways in which such change of possession can take place without transportation. For example, the bootlegger might, without any previous understanding or even knowledge on the part of the other party, bring the liquor to the customer's house, sell it to him and leave it there, or there might be a sale of liquor together with the premises on which it was stored, followed by the seller's moving out and the purchaser's moving in. Hence,

> the rule which forbids indictments for conspiracy in that class of crimes which can not be committed, except by the agreement of two parties, is not to be extended to the transportation of liquor even though it may be incident to a sale. The dictum of the Supreme Court in *U. S.* v. *Katz, supra,* to the effect that the embarrassment caused by that rule "could be avoided only if the buyer and seller were charged with conspiring to commit a substantive offense having an ingredient in addition to the sale, not requiring the agreement of two persons for its completion," is plainly applicable to an indictment for conspiracy to transport.

Regarding defendant's contention that the record failed to show that degree of cooperation on his part necessary to make him a conspirator to commit the substantive offenses of illegally transporting and shipping liquor, as charged, the court declared (R. 12):

> Of course, mere knowledge that a crime is about to be committed by another does not make the inactive party a conspirator, nor will awareness, coupled with acquiescence and possibly expressed approval and encouragement have that result. But in respect of the transportation, Norris did far more than know and acquiesce. He also did more than merely let Kerper know that he was in the market for liquor. By his repeated orders of whiskey telephoned from New York to Philadelphia, he became party to an agree-

> ment which required Kerper to transport the liquor and he promised to pay him for doing it. Thus he not only solicited, but bound Kerper, by such obligation as the character of the transaction permitted, to commit the offense. As was pointed out in *U. S.* v. *Holte, supra* (236 U. S. 140), the word "commit" in the conspiracy statute means no more than "bring about." It is beyond all question that the purpose and intent of the agreement was to bring about the transportation of the liquor from wherever it may have been to Norris's home.

In concluding its opinion, the court summarized the foregoing statement of the law applicable to the stipulated facts as follows (R. 12–13):

> The conclusion is (1) that a conviction may be had of a buyer and seller of liquor for conspiracy to transport liquor in a case where the agreement is that the delivery of the liquor sold is to be effected by transportation from the seller to the buyer, and (2) that an order by a purchaser to a bootlegger located at a distance, to deliver liquor followed by transportation, delivery and payment is sufficient evidence of such an agreement.
>
> What has been said applies with equal if not greater force to the second count of the indictment.

Upon appeal, the judgment was reversed by the Circuit Court of Appeals, one judge dissenting. In that court, counsel for the Government, with a

view to limiting the inquiry to the question whether a charge of conspiracy to transport liquor illegally will lie against the purchaser and the seller of the liquor where the negotiations resulting in the sale contemplated a transportation and a delivery of the liquor, waived the second count in the indictment and that count was not considered by the court.

The considerations which led the Circuit Court of Appeals to conclude that "a sale of liquor involving such transportation as is necessary to effect the delivery to the purchaser, does not subject the purchaser and seller to an indictment for conspiracy to transport" may be summarized as follows: (1) Under the Eighteenth Amendment and the National Prohibition Act, the purchase of liquor is not an offense; (2) the indictment of a purchaser for conspiracy with the seller is an attempt to make the purchaser liable indirectly for an act which Congress has refused to make an offense; (3) a charge of conspiracy to commit an offense will not lie where a concert of action between the parties charged is necessary to the commission of the substantive crime; (4) in the case of buyer and seller, transportation by the seller is a mere incident of the sale necessary to its completion by delivery to the purchaser, and as a sale necessarily involves an agreement, or concert of action, between the buyer and the seller to effect the purchase, a charge of conspiracy will not lie against the purchaser for agreeing with the seller

that the liquor shall be transported and delivered to the purchaser; (5) under the authorities, a purchaser is not guilty of aiding and abetting either the sale or the delivery, and the degree of cooperation to constitute one a conspirator must be more than that involved in the mere aiding and abetting of the commission of the substantive offense.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In reversing the judgment of the District Court.

2. In holding that "a sale of liquor involving such transportation as is necessary to effect the delivery to the purchaser, does not subject the purchaser and seller to an indictment for conspiracy to transport."

3. In holding that one who gives orders to a bootlegger in another city to ship him intoxicating liquor for beverage purposes and who receives and pays for the shipments of liquor consigned to him by said bootlegger in response to such orders is not guilty of conspiracy to transport intoxicating liquor in violation of the National Prohibition Act.

4. In holding that the evidence failed to show such a degree of cooperation by Norris in the illegal transportation as to render him guilty as a conspirator to commit that offense.

REASONS FOR GRANTING THE WRIT

The question involved in this case is one of great public interest and importance. The decision of

the court below has been given wide publicity. Unless corrected by this Court, it will have a very detrimental effect upon the enforcement of the prohibition laws. The reasons advanced by the court below might equally prevent successful prosecution of a purchaser for a conspiracy to import liquor.

Furthermore, by misapplication of the rule that a charge of conspiracy to commit an offense will not lie where a concert of action on the part of those charged was essential to the commission of the substantive crime, the court has narrowed the scope of the conspiracy statute so as to render it inapplicable to a large number of cases to which, we submit, it does apply. In this respect the decision affects not only conspiracies to violate the prohibition laws, but other conspiracies to commit offenses against the United States.

Wherefore, it is respectfully submitted that this petition for certiorari to review the judgment of the Circuit Court of Appeals in the above-entitled cause should be granted.

CHARLES E. HUGHES, JR.,
Solicitor General.

JANUARY, 1930.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the District Court (R. 10–13) is reported in 29 F. (2d) 744, and that of the Circuit Court of Appeals in 34 F. (2d) 839.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 3, 1929. The jurisdiction of this Court to issue the writ applied for is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

This case presents the question whether one who repeatedly sends telephone orders to a bootlegger in another city to ship him intoxicating liquor for beverage purposes and who receives and pays for the liquor shipped to him by the bootlegger pursuant to such orders is guilty of conspiracy to transport intoxicating liquor in violation of the National Prohibition Act.

STATUTES INVOLVED

Section 3, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 308 (U. S. C. Title 27, Sec. 12) provides, so far as here important:

> No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Section 37 of the Criminal Code (U. S. C. Title 18, Sec. 88) provides:

> If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined * * *.

STATEMENT

A statement of the case and the errors relied upon will be found in the petition.

ARGUMENT

While the court below holds that the purchase of liquor is not an offense under the National Prohibition Act and speaks of this prosecution as an attempt to make the respondent liable indirectly for an act which was a mere incident in the purchase of liquor, the case actually does not involve the question whether the purchase of liquor is or is not an offense.

The court reached its decision upon the following line of reasoning: That a charge of conspiracy to commit an offense will not lie where a concert of action between the parties charged is necessary to the commission of the substantive crime; that where liquor is sold by one person to another it is essential that there be a concert of action between the buyer and seller to effectuate the sale, and, therefore, neither can be charged with conspiracy

to make the sale; that delivery of the thing sold is essential to consummate the sale, and that, as delivery in the present case could be accomplished only by transporting the liquor to the place of delivery, the transportation was a mere incident of the sale necessary to its completion by delivery to the purchaser, and, therefore, neither party to the transaction is subject to prosecution for conspiracy to bring about such transportation.

We submit that this reasoning is fallacious. The offense charged in the indictment was not conspiracy to *sell* liquor but conspiracy to *transport* it. Under Section 3, Title II, of the National Prohibition Act, the offense of transporting liquor is committed when the transportation is effected in any manner or for any purpose not authorized by that Title. *Cunard Steamship Co.* v. *Mellon*, 262 U. S. 100. As was said by this Court in that case (pp. 121–122):

> Some of the contentions ascribe a technical meaning to the words "transportation" and "importation." We think they are to be taken in their ordinary sense, for it better comports with the object to be attained. In that sense transportation comprehends any real carrying about or from one place to another. It is not essential that the carrying be for hire, or by one for another; *nor that it be incidental to a transfer of the possession or title.* If one carries in his own conveyance for his own purposes

> it is transportation no less than when a public carrier at the instance of a consignor carries and delivers to a consignee for a stipulated charge. (Italics ours.)

See also *Grogan* v. *Walker & Sons*, 259 U. S. 80, 90; *Corneli* v. *Moore*, 257 U. S. 491, 496–497.

It is immaterial, therefore, by whom or for what purpose the transportation takes place if not authorized by the Act. Whether it be for the purpose of sale at destination, for personal consumption by the transporter, or for delivery to one to whom it has been sold, the offense is nevertheless committed. In the present case, it is conceded that the liquor was transported and for beverage purposes. As such a transportation was not authorized by Title II of the National Prohibition Act, it was clearly an offense under Section 3.

We submit that the language of this Court in *United States* v. *Katz*, 271 U. S. 354–355, tends to support the conspiracy charge in this case. The Court said:

> The overt act charged in each indictment was the sale of whisky by one defendant to the other. This is an offense under the National Prohibition Act; but as the defendants in each case were only one buyer and one seller, and as the agreement of the parties was an essential element in the sale, an indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity. Compare *United States* v. *N. Y. C. & H. R. R.*, 146 Fed. 298;

United States v. *Dietrich*, 126 Fed. 664; *Vannata* v. *United States*, 289 Fed. 424, 427. This embarrassment could be avoided in an indictment for a criminal conspiracy only if the buyer and seller were charged with conspiring to commit a substantive offense having an ingredient in addition to the sale, not requiring the agreement of two persons for its completion. See *Chadwick* v. *United States*, 141 Fed. 225.

Unlike the offense of illegally selling liquor, which necessarily requires for its commission an agreement or concert of action, tacit or otherwise, between buyer and seller, the offense of transportation may be committed by one person without any agreement or concert of action with anyone else. See *Chadwick* v. *United States* (C. C. A. 6th), 141 Fed. 225, 236. The rule that a charge of conspiracy to commit an offense, such as illegal sale, bribery, bigamy, adultery, dueling, and the like, will not lie where the only persons charged are those whose agreement or concert of action is essential to the commission of the substantive crime, has no application, therefore, to a charge of conspiracy to transport in violation of law.

Recognizing the force of the foregoing principles, and in order to avoid their effect, the court below adopted the theory that the transportation of liquor in this case was not a transportation prohibited by Section 3, but was a mere incident of the sale of the liquor. This conclusion was based upon the further

holdings of the court that delivery of the liquor was required to complete the sale and that the transportation in question was essential to effect such delivery. It is settled, however, that actual delivery to the purchaser of the article sold is not essential to a completion of the sale. Thus, it has been held that the seller fulfills his obligation where the goods are placed at the buyer's disposal so that he may remove them without legal obstruction (*Glasgow* v. *Nicholson,* 25 Mo. 29; *Davis* v. *Alpha Portland Cement Co.,* 134 Fed 274); or where the goods are at a distance from the place of sale and the buyer is told to go and take them (*Patrick* v. *Meserve,* 18 N. H. 300).

Moreover, even if it be conceded that a sale can not be consummated without an actual delivery of the thing sold, it is nevertheless plain that such delivery may be made without a transportation. This is illustrated by the examples given by the District Court of the case where a bootlegger, without any previous understanding or knowledge on the part of the purchaser, takes liquor to his house, sells it to him and leaves it there; as well as of the case where liquor and the premises upon which it is stored are sold together and the purchaser moves in upon the seller's moving out.

But even if it were assumed that the transportation here involved was, as the court held, a mere incident of the sale, it is nevertheless submitted that such transportation would be an offense under Section 3, for, as indicated by the decisions of this

Court heretofore cited, that offense is committed by any transportation not authorized by Title II of the Act.

We submit also that the Circuit Court of Appeals erred in its further holding that the facts failed to show such a degree of cooperation by Norris in the illegal transportation as to render him guilty as a conspirator to commit that offense. His repeated orders telephoned from New York to Philadelphia and his receipt of and payment for the consignments of liquor shipped to him pursuant thereto leave no room for doubt that the illegal transportations were the result of an agreement, mutual understanding, or concert of action between him and his codefendant Kerper.

The effect of the opinion of the Circuit Court of Appeals seems to be that ordinary rules of criminal liability for conspiracy may not be invoked against a purchaser of liquor. We submit that such a notion finds no support in the law. Whether or not the National Prohibition Act makes the act of purchase a crime in itself (a question which is not involved in this case), it manifestly does not invest the purchaser with any special immunity from the consequences of doing those things which beyond question are made criminal. If the purchaser carries the liquor to his home, he is guilty of the crime of transportation, and while he keeps it he is guilty of the crime of possession. If a purchaser agrees

and cooperates with the seller to have the liquor transported not to himself but to a friend, it seems clear that he is guilty of a conspiracy to transport. We submit that there is no reason why the fact that the agreed transportation is to himself makes him less guilty.

CONCLUSION

The case was incorrectly decided below. It involves a question of sufficient general importance to justify a review by this Court. The petition for certiorari should therefore be granted.

Respectfully submitted.

CHARLES E. HUGHES, JR.,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
JOHN J. BYRNE,
MAHLON D. KIEFER,
Attorneys.

JANUARY, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930